Supreme Court, U.S.
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No. 091177

IN THE SUPREME COURT OF THE UNITED STATES

DONNELL MCCLOUD,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The PROTECT Act outlaws, among other things, the use of minors in the production of child pornography. The reach of the PROTECT Act however, exceeds its constitutionally allowable limits. Specifically, it violates the First and Fifth Amendments as well as Article I, § 8, Clause 3, the Commerce Clause. The Circuits have split in regards to the issue of the Amendments and robotically repeat themselves in regards to the Commerce Clause issue. Because these holdings create confusion and discord, this Court should grant certiorari to resolve these issues.

1. Whether a court can constitutionally prevent a Defendant from asserting a mistake-of-age affirmative defense when knowledge of age is not an element of the offense.

2. Whether 18 U.S.C. § 2251 is unconstitutional because it does not require *mens rea* element for any criminal behavior.

3. Whether interstate travel of an inanimate object related to the offense is enough to satisfy the constitutional requirement of interstate "commerce."

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PETITION FOR A WRIT OF CERTIORARI

Petition Donnell McCloud respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1A-17A) is reported at 590 F.3d 560.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S.CONST. AMEND. I provides in relevant part:

Congress shall make no law... abridging the freedom of speech.

U.S.CONST. AMEND. V provides in relevant part:

"No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 18 U.S.C. § 2251(a) states:

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual

depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

Article 1, § 8, Clause 3 states in relevant part: "[The Congress shall have Power] to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

STATEMENT

Arguably, the most unpopular criminal defendants in the nation today are those accused of sex offenses against minors. Because of Congress's distaste for these actions, the PROTECT Act was passed, making many sex offenses against minors federal offenses.

Mr. McCloud was prosecuted and convicted after a jury trial of violations of 18 U.S.C. § 2251(a).

The genesis of the investigation in this case was in 2004 when officers conducted a search of then twenty-four-year old Donnell McCloud's St. Louis, Missouri home. In that search, detectives discovered a bag belonging to Mr. McCloud that contained photographs of nude females. No charges were filed at that point.

In February 2008, St. Louis City officers obtained a search warrant for Mr. McCloud's apartment for drugs and narcotics. When the police were inside the home, they discovered Mr. McCloud and a fifteen-year-old girl, KG,[1] who was wrapped in a sheet by the bed. Police seized a computer and a digital camera, which were later searched under the authority of a federal search warrant. Mr. McCloud was arrested and charged with both state and federal charges of possession and production of child pornography.

The federal charges of possession of child pornography were later dismissed and Mr. McCloud went to trial on three counts of production of child pornography pursuant to 18 U.S.C. § 2251(a). The charges involved three separate victims: KG, of whom images were found on the camera's memory card; CW, and GD. Photographs of CW and GD were among those found in the bag in 2004. At trial, KG and CW testified, but GD was deceased.
At trial, the searching officer testified that he located movie files on the camera's memory card, some of which were played for the jury and were of KG. KG testified to being with Mr. McCloud sexually and taking pictures of it. The two were in a consensual relationship and were not producing commercial pornography. There was evidence that KG had met Mr. McCloud in an adult-only website and had misrepresented her age to him, even showing him fake identification.

The government submitted a letter from Lexar Media, Inc. and a statement from the manufacturer of the camera's memory card. The officer testified that the memory card was manufactured in Taiwan and then shipped to the United States via Korea.

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[1] Because the victims in this case are underage minors, their names have been redacted and initials have been used as their identification.

The photographs in the bag were printed on Fujifilm brand paper. The Government presented an affidavit from the Fuji Corporation stating that type of paper is generally manufactured in South Carolina and sometimes in the Netherlands. CW testified that she dropped off the film roll at a Wal-Mart in the St. Louis area to be developed. There were no allegations that Mr. McCloud ever forced any of the girls to participate in the sexual activity or take the pictures. But at no point in the trial was he permitted to argue mistake-of-age in any form. The jury returned a guilty verdict on all three counts and the district court sentenced Mr. McCloud to thirty years' imprisonment.

He filed a timely appeal with the Eighth Circuit. The Court of Appeals affirmed the district court's holdings in a published opinion. Mr. McCloud now seeks review of this court to determine the constitutionality of the application of 18 U.S.C. § 2251(a) and settle the split among the Eighth and Ninth Circuits and define Congressional authority.

REASONS FOR GRANTING THE PETITION

I: THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER A COURT CAN CONSTITUTIONALLY PREVENT A DEFENDANT FROM ASSERTING A MISTAKE-OF-AGE AFFIRMATIVE DEFENSE WHEN KNOWLEDGE OF AGE IS NOT AN ELEMENT OF THE OFFENSE.

Both the statutory and constitutional holdings of the circuit courts warrant this Court's attention. The ability—and inability—to present an affirmative defense of mistake of age violates a defendant's First and Fifth Amendment rights. In regards to the First Amendment, the Circuits are split on whether or not to allow this defense as the statute itself is silent on the issue. The Fifth Amendment implications have been swept into a separate argument,

ignored by the Circuits. As the list of definable sex offenses grows, and the availability of technology to create these offenses is more readily available, this Court must set the tone for the nation on how to deal with these cases in light of conflicting statutes and conflicting lower court interpretations.

First Amendment

The Eighth Circuit has specifically stated that it has "declined to adopt the Ninth Circuit's rationale." *United States v. Pliego*, 578 F.3d 938, 943 (8th Cir. 2009) *citing United States v. Wilson*, 565 F.3d 1059, 1067-69 (8th Cir. 2009). These opinions dealt specifically with whether disallowing a mistake-of-age defense violated a defendant's free speech rights under the First Amendment. A split among the circuits disallows equal protection among defendants. Had Mr. McCloud been in Montana instead of Missouri, he would have been permitted to present his affirmative defense. This type of discord demands reconciliation from this Court.

In *United States v. United States Dist. Court for Cent. Dist.* 858 F.2d 534 (9th Cir. 1988), the Ninth Circuit held that disallowing an affirmative mistake-of-age defense violates a defendant's First Amendment rights. Instead, allowing this defense would only be available when a teenager that looks older purposefully lied, and willingly participated in the sexual activity.

> We have little doubt that Congress would prefer section 2251(a) with a reasonable mistake of age defense to no statute at all. Allowing defendants to prove their reasonable, good-faith belief as to the age of an actor would not seriously disrupt the effective operation of section 2251(a), or materially hamper the vital effort to protect minors from sexual abuse. Such a defense would be entirely implausible under most circumstances, particularly in cases involving children or

> prepubescent teenagers. Even when dealing with older teenagers, a defendant would have a tough row to hoe in convincing a jury that he had acted with appropriate prudence in ensuring that the actor or actress was an adult. Cases like this one, where the actress allegedly engaged in a deliberate and successful effort to deceive the entire industry, are likely to be exceedingly rare; even in those rare instances, juries may well be skeptical and choose to convict.

United States v. United States Dist. Court for Cent. Dist., at 542-543.

The Ninth Circuit went on to explain that "[a]s to those rare cases where otherwise culpable defendants may be exonerated on the basis of a reasonable mistake of age defense, we can only note that even as compelling a societal interest as the protection of minors must occasionally yield to specific constitutional guarantees." *United States Dist. Court* at 543 citing *Coy v. Iowa*, 487 U.S. 1012 (1988) (confrontation clause bars use of screen to shield defendant from view of testifying victim of teenage sexual abuse, even though screen was intended to protect the minor from trauma).

The Ninth Circuit distinguished the affirmative defense from the lack of a *mens rea* element in the statute, stating:

> [T]he statute is silent on whether reasonable mistake of age may serve as an affirmative defense. Moreover, unlike the question whether scienter should be an element of the government's prima facie case, there is no evidence that Congress considered and rejected the possibility of providing for such a defense. Engrafting such a defense would therefore not require us "to ignore the

> legislative will in order to avoid constitutional adjudication."

United States v. United States Dist. Court for Cent. Dist. at 542 *quoting Schor*, 478 U.S. at 841. The Ninth Circuit went on to explain:

> Moreover, the federal courts may, in limited circumstances, recognize an affirmative defense where a statute does not expressly provide it. For example, the due process clause supplies a defense in a criminal case where government officials engage in outrageous conduct. The Court has also recognized entrapment as an affirmative defense, reasoning that, so long as Congress has not clearly indicated to the contrary, "it will always . . . be presumed that the legislature intended exceptions to its language which would avoid [injustice, oppression, or an absurd consequence]." If the presumption that Congress would not intend "absurd or glaringly unjust results" suffices to justify the affirmative defense of entrapment, *Sorrells*, 287 U.S. at 450, we may certainly supply a narrow mistake of age defense here in order to avoid constitutional infirmity."

Id. at 542 (Internal citations omitted).

In this case, the Eighth Circuit simply "declined to adopt the Ninth Circuit's rationale," citing to *Pliego* at 943. In this case, the Eighth Circuit rested on its previous holdings in *Pliego* and *Wilson*, wherein the Eighth Circuit explained that it felt as though production of child pornography was akin to statutory rape, which "serves to overcome the background presumptions of *mens rea* and scienter." *Pliego* at 943. And secondly, the Eighth Circuit felt that "given the opportunity producers have to verify the ages of the actors they employ, we do not think the risk of error or fraud in determining someone's age is 'significant

enough to chill a substantial amount of protected speech...'" *Wilson* at 1069, quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255, 122 S.Ct 1389, 152 L. Ed. 2d 403 (2002). In *Pliego* and *Wilson*, the Eighth Circuit concluded that those "two factors combined with the strong interest the state has in protecting children from sexual exploitation, fatally undermine [the defendant's] First Amendment claim." *Wilson* at 1069; *Pliego* at 944.

This reasoning—if it can even be classified as such—is squarely opposed to the reasoning in the Ninth Circuit, which acknowledges an underage actor's ability to lie and falsify documents about his or her age, and recognizes the circumstances under which a defense like this could and would be raised. The Ninth Circuit's reasoning has not been refuted per se by the opposing circuits, but rather they simply elect to "not follow" the Ninth Circuit's interpretation of the statutes.

The Eighth Circuit in *Wilson* states that statutory rapists are "not entitled to any *mens rea* safeguards." At 1069. This is not entirely accurate. In Missouri, which is where the criminal activity in this case occurred, mistake of age is a defense to statutory rape. R.S.Mo. § 566.020.3.[2] Thus, Mr. McCloud can defend himself for the sexual activity, but once it is photographed, he no longer has this due process right.

The logic on which the Eighth Circuit rests is not sound. Rather than state specific reasoning for disagreeing

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[2] "Whenever in this chapter the criminality of conduct depends upon a child being under seventeen years of age, it is an affirmative defense that the defendant reasonably believed that the child was seventeen years of age or older." It should be noted that the legal age of consent in Missouri is 17. So essentially, a seventeen-year-old may legally participate in any sexual activity, but if that act is photographed by anyone, it becomes a criminal violation of 18 U.S.C. § 2251.

with established law of the Ninth Circuit, the Eighth Circuit summarily disagrees and refuses to allow defendants to present their defense.

There really is no "process" of culpability here. All the government must prove is a set of circumstances. A defendant has rights of due process of law before he can be deprived of his liberty. This would include the right to defend himself. So a denial of the ability to present a reasonable affirmative defense violates his due process rights.

The Government, who has the benefit of the executive branch of the federal government to determine the age of the victims, must prove the age, yet the defendant may make no argument whatsoever that he or she was unaware of that age, or misled about the age. But simply because Congress did not intend for the *prosecution* to prove a specific element of the offense, it does not necessarily mean that a defendant cannot present to the jury an affirmative defense to the crime. An affirmative defense is essentially saying "yes, I did what the prosecution is saying I did. *But,* I have a reason that I am not guilty of this *crime*." For example, in a self-defense claim, the defense is not negating any of the elements of the prosecution's case. Instead, it offers an explanation for why the behavior – in spite of the elements – is not a *crime*.

Permitting an affirmative defense does not frustrate the overall intent of Congress. Congress's lack of scienter serves only the Government's case and burden of proof. Congress's removal of the *mens rea* from § 2251 relieved the Government from needing to prove what was going through the mind of the one that snapped the picture or pressed record on the video camera. Instead, an affirmative defense is permitting the defendant to explain what was going through his mind. In fact, it is this explanation that gives the jury the entire set of facts to pass judgment on whether the defendant is in fact an abuser of children. In

our judicial system, what purpose is served by hiding things from the jury?

In *United States v. Ransom*, 942 F.2d 775 (10th Cir. 1991), the Tenth Circuit addressed the issue of mistake-of-age and the Fifth Amendment as it related to 18 U.S.C. § 2241(c). In that case, the Defendant was denied a mistake-of-age affirmative defense after being charged with engaging in sexual intercourse with a female minor under the age of twelve. The Tenth Circuit, in holding that disallowing a mistake-of-age defense for crimes against a person under age twelve, stated that "[t]he statute is based on a legislative determination that 'no credible error of perception would be sufficient to recharacterize a child of such tender years as an appropriate object of sexual gratification.'" *Ransom* at 777, quoting H.R. Re. No. 594, 99th Congr., 2d Sess., *reprinted in* 1986 U.S.Code Cong. & Admin. News at 6195-96.

But that logic cannot be carried over to § 2251. The statute here makes the criminal age for the child anyone under the age of eighteen. Many states recognize people under age eighteen as "an appropriate object of sexual gratification." Most importantly, Missouri, where this offense occurred, is such a state.[3]

The Tenth Circuit in the *Ransom* case cited a string of sources from journal articles and notes to the Blackstone Commentaries to cases dating back to the 1920s. But the theme of these cites highlights the need for a decision from this court on the role of *mens rea* and its effect on affirmative defenses in crimes of this sort, which carry such serious and heavy punishments.

In *Gilmour v. Rogerson*, 117 F.3d 368, 372 (8th Cir. 1997), the Eighth Circuit stated that "[t]he State's interest in discouraging minors from posing as adults by eliminating the mistake-of-age defense is entitled to great weight. Yet, eliminating a mistake-of-age defense does not

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[3] *See* note 2 *supra*.

discourage a minor from lying whatsoever. They actually have more incentive to lie and then when they are angry or have simply changed their minds about what they are doing, they can then act in vengeance toward the person they lied to in order to get them in trouble, much like the "victim" in *Gilmour*.

In that case, a young woman hired a photographer to take nude photographs of her and showed him fake identification when he attempted to verify that she was eighteen or over. Later, she became angry he would not give her the negatives so she turned him in for a crime he didn't know he was committing. For her, lying, manipulating, and producing fake identification documents were without consequence. Why on earth would she ever be discouraged from doing that again?

These types of illogical legal conclusions need reconciliation from this Court in order to remove the growing confusion, manipulation, and discord surrounding these crimes.

II: WHETHER 18 U.S.C. § 2251 IS UNCONSTITUTIONAL BECAUSE IT DOES NOT REQUIRE A *MENS REA* ELEMENT FOR ANY CRIMINAL BEHAVIOR.

In 1994, this Court decided *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed. 2d 372 (1994). That case focused on 18 U.S.C. § 2252, but the dicta explained Congress's reasoning for deleting the scienter requirement from § 2251:

> The difference...reflects the reality that producers are more conveniently able to ascertain the age of performers. It thus makes sense to impose the risk of error on producers. Although producers may be convicted under § 2251(a) without proof they had knowledge of age, Congress has independently required both primary and secondary producers to record the

> ages of performers with independent penalties for failure to comply.

At 76, n.5 (internal citation omitted). It is this dicta that is now used to uphold challenges to the *mens rea* issues with § 2251. But this actually shows that even this Court needed to consult with the Congressional record for clarification. Thus the language of the statute itself creates a Fifth Amendment issue. Practically, this cannot serve as notice to the general population of what behavior will and will not qualify as criminal. Without proper notice of the crime, one cannot be prosecuted for it in light of the Fifth Amendment.

Furthermore, as the Court is no doubt aware, the world in 2010 is quite different than in 1994. Now, teens are able to snap illicit photographs on their cell phones and instantaneously "create" child pornography.[4] They can then send that image in an email, text message, or upload it to the internet in seconds and instantaneously "distribute" child pornography. Furthermore, with a few clicks on the internet and a few dollars (if even), a teenager could get false identification documents, cards, or badges. A person can then use these to deceive another into believing they are not 16 or 17, but 18 or older. For young people in their twenties, like Mr. McCloud, it is near impossible to tell the age of a girl, especially when she is actively lying about her age and in possession of false identification documents.

X-Citement Video dealt with commercial manufacturers of pornography. But the holding has spilled over into people's personal relationships. So now, we as a nation, punish people for making homemade videos of

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[4] Most recently, *see Miller et al, v. Mitchell*, No. 09-2144 (3rd Cir. March 17, 2010)(The Third Circuit granted an injunction against a local prosecutor for trying to make teen girls write an essay about their behavior after producing and distributing nude pictures of themselves.)

personal relationships (which is the case here), for inadvertently receiving a text or email from a trampy teen, and even for people who photograph *themselves* and choose to distribute it.

The Eighth Circuit in *Gilmour* observed that "In this information age, a prudent photographer or movie producer may readily and independently confirm the age of virtually every young-looking model. At 372-373. Again, this presumes the only people being prosecuted for producing child pornography are "producers" using "models."

But the converse of the Eighth Circuit's logic is true. In this day and age, young people are very computer savvy and have the ability to produce false documents, much like the victim in this case as well as in *Gilmour*. And while a professional photographer or movie producer might have the resources to conduct such a thorough background check on a model, the average person, who is simply recording a consensual sex act for personal enjoyment, does not. The Ninth Circuit had a much less naïve assessment of this situation:

> The dissent suggests that "it would be simple for a pornographer to write his subject's birthplace for a certified copy of the subject's birth certificate." Dissent at 1270. It would be simple, however, only where the pornographer knows the subject's real name. We doubt that an actress using forged documents would use her real name. As our experience with undocumented aliens has shown, document forgery is big business and detecting forgeries can be virtually impossible.

United States v. United States Dist. Court for Cent. Dist. at 540 n.2.

While the lack of a *mens rea* element by itself should not preclude the defendant from presenting the mistake-of-

age defense,[5] this lack of scienter by itself is a due process violation. Due process requires that the government prove each element of a *crime* to the fact finder. Yet, in this statute, Congress removes that due process requirement by removing a *mens rea* element. The only action a person must "knowingly" do is the legal activity of filming a sexual act. The criminal portion of the activity requires no intent of any kind. This is due process violation. By upholding this statute, the Courts are essentially saying that due process is for everyone except those that are lied to by conniving, promiscuous teenagers.

Rooted in English common law, "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250-251 (1952). Simply put, without a *mens rea*, the action is nota crime at all.

"Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must *first* be a 'vicious will.'" *Morissette* at 251 (emphasis added). In removing any intent to commit a crime, Congress essentially gives the prosecution free reign to prosecute people as "criminals" who have no such notion or purpose. As explained in *Morissette*,

> The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at

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[5] *See* Issue I, *supra*.

> common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries.

At 262.

The strict liability of this crime is quite different than other strict liability crimes. For example, 21 U.S.C. § 841(b)(1)(C)[6] criminalizes distribution of a controlled substance resulting in the death of another person. Yet the death of the person requires no *mens rea*. The only intent that must be shown is that the defendant illegally distributed the drugs. There is no foresight required in punishing the defendant for the death that resulted.[7]

But in comparing that statute with this one, the government still must prove criminal intent. Distributing drugs is illegal and had no death ever resulted, it would still be a crime itself. But producing pornography is not illegal. It is protected speech. The *only* thing that makes it a crime is the age of the actor. Thus, to negate any

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[6] 21 U.S.C. § 841"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;...

(b)(1) (C) In the case of a controlled substance...such person...if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life..."

[7] *See United States v. Patterson*, 38 F.3d 139 (4th Cir. 1994), *cert. denied*, 514 U.S. 1113, 131 L. Ed. 2d 858, 115 S. Ct. 1968 (1995); *United States v. Robinson*, 167 F.3d 824, 831 (3d Cir. 1999).

criminal intent whatsoever deprives people of their liberty without any showing of criminal behavior.

The Eighth Circuit looked to Congress's intent rather than Congress's authority. Congress may indeed have whatever intentions it wishes, but intentions do not override Constitutional boundaries. It is noted irony that Congress's intent serves to ignore the defendant's intent. While the intention to protect children from sexual predators is noble and socially desirable, the effect of this law is not to do that. In order for a law to protect children from a sexual predator, it must regulate the behavior of sexual predators. Without a *mens rea* element, this law does not do that. It instead regulates the behavior of people, who themselves were reasonably deceived into believing that the person they were filming or photographing was the age they claimed to be. Filming or photographing someone that the photographer reasonably believes to be of age does not a sexual predator make.

The Warren Court stated that "[w]e do not go with Blackstone in saying that a 'vicious will' is necessary to constitute a crime, 4 Bl. Comm. 21, for conduct alone without regard to the intent of the doer is often sufficient." *Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed. 2d 228 (1957). This case, in holding that the prosecuting the defendant without *mens rea* was an unconstitutional violation of the defendant's due process rights, drew a very fine line between feasance and nonfeasance. In that case, the defendant failed to register as a felon, but had no knowledge she was required to register. The violation was prosecuted as a strict liability offense and this Court stated that

> Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.

Id. at 230. In the dissent, however, Justice Frankfurter argued that the line being drawn was essentially hair-splitting. Quoting Justice Holmes, "'It is not inended to deny that criminal liability, as well as civil, is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it another way, a law which punished conduct which would not be blameworthy to the average member of the community would be too severe for that community to bear.'" *Lambert* at 231, Frankfurter's Dissent, quoting Holmes, The Common Law, at 49-50.

It is still this case, over fifty years later, that is quoted as the reasoning for justifying a lack of criminal intent in a crime. But this case casts as much of a shadow over the topic as it does light. The line that had once been drawn is now irrelevant to a society that is as dependent and intertwined with technology as it is a need for clear and concise laws. This Court must weigh in on the proper bounds of strict liability and due process. In a land of loose morals and runaway technology, the values of justice are in desperate need of an upgrade. It is time for *Lambert* 2.0. It is no small thing that the Petitioner here is requesting: for the Court to consider the logic and reasoning of the law and its constitutionality over its tradition and history. Tradition itself is of little consequence to the inmate serving a lifetime sentence for a crime he did not realize he was committing.

The theme of most of the past commentary and caselaw on the topic focuses on whether Congress and the American judicial system *should* permit strict liability crimes. Yet, there is little explanation and history regarding whether or not the government *could* in light of the Fifth Amendment's due process guarantees. What the history does suggest though, is a need for a unilateral

application of Fifth Amendment protections to criminal defendants.[8]

III: WHETHER INTERSTATE TRAVEL OF AN INANIMATE OBJECT RELATED TO THE OFFENSE IS ENOUGH TO SATISFY THE CONSTITUTIONAL REQUIREMENT OF INTERSTATE "COMMERCE."

The new evolution of cases is that "interstate commerce" is merely interstate *movement*. This is diametrically opposed to the *Ogden* case of 1924 and others of that era. More potently, it is diametrically opposed to the language of the commerce clause itself. It is the commerce clause, not the travel clause. One has to assume that the authors of the clause were very well capable of using the word "travel" had that been the intent for the powers of Congress to regulate.

By interpreting the commerce clause as the authority to regulate anything that has ever crossed a state line—or even utilized something that crosses state lines—the limitations of Congress have effectively been removed. In this day and age, there is literally nothing that Congress cannot seize from the states to regulate if this is indeed the interpretation by the Courts.

Since there is such a divergence from the plain language of the Constitution and the early cases interpreting the Commerce Clause *vis-à-vis* the holding in this case, and those similar to it, there must be some sort of explanation given. Yet, explanation is missing from nearly all of the cases. Indeed, with the Eighth Circuit's opinion here, it was simply summarily denied citing to previous decisions in recent years, which also simply denied the point without addressing the argument.

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[8] *See generally Ratzlaf v. United States*, 510 U.S. 135 (1994).

Congressional authority for legislating 18 U.S.C. § 2251 comes from the Commerce Clause of the Constitution. U.S. CONST. Art. 1, § 8.

While this Court has not directly held that § 2251 is a constitutional exercise of Congress's authority under the commerce clause, the Eighth Circuit specifically has made that holding.[9] Those holdings are always based on the activity of child pornography production rather than the instrumentalities of interstate commerce. However, § 2251 is written, and was pled that the federal government has jurisdiction because the crime involved "instrumentalities of interstate commerce."

The Commerce Clause: More Than Mere Traffic

Article 1, § 8, Clause 3 states that "[The Congress shall have Power] to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Most of this Court's rulings on this clause have dealt with state legislation that impeded interstate commercial activity.[10] The cases evolved and in 1995, this Court issued a ruling in *United States v. Lopez* that specifically outlined the areas Congress may regulate under the commerce clause. 514 U.S. 549 (1995). The *Lopez* court identified three broad categories that Congress may regulate under its power: (1) Channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities having a substantial relation to interstate commerce. *Lopez* at 558-559.

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[9] *See United States v. Bausch,* 140 F.3d 739 (8th Cir. 1998); *United States v. Hoggard,* 254 F.3d 744, 746 (8th Cir. 2001); *United States v. Hampton,* 260 F.3d 832, 833-34 (8th Cir. 2001); *United States v. Mugan,* 441 F.3d 622 (8th Cir. 2006).

[10] *See United States v. Lopez,* 514 U.S. 549, 553-554 (1995) for history and background on these decisions.

In 2005, this Court in *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195 (2005) adopted a macrocosmic approach to interpreting the commerce clause. This case dealt specifically with the Controlled Substances Act (CSA), and a defendant that grew marijuana for personal medicinal use in line with California state law. The Supreme Court held that because the drug trade substantially affected interstate commerce, the federal law was not a violation of the Commerce Clause.[11] As this case was being decided, cases were pending grant of certiorari addressing this same issue in regards to the PROTECT Act. Instead of deciding these cases on their own merit, the Court simply remanded the cases with instructions to issue orders in line with its decision in *Raich*.[12]

Yet, with case after case detailing how the child pornography industry affects interstate commerce, there is little explanation or discussion about the need for an added element of "instrumentality" of interstate commerce, which is category two of *Lopez*. The CSA does not have any such jurisdictional element and thus, the statute and the caselaw are in accord. The child pornography statutes however do contain that element and, as in this case, are pled to establish that the statute is not actually regulating activity in interstate commerce, but instrumentalities of interstate commerce. In holding the statute to the

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[11] It is interesting to note, however, that this Court did not go so far as to declare state statutes that regulate the drug trade an unconstitutional exercise of state control over interstate commerce (the dormant commerce clause). In the early commerce clause cases, the Supreme Court necessarily overturned state attempts to regulate interstate commerce. Yet in *Raich*, it made no such holding.

[12] *See e.g. United States v. Maxwell* 446 F.3d 1210 (11th Cir. 2006); *United States v. Matthews*, 184 Fed. Appx. 868 (11th Cir. 2006).

standard to which it is written and pled, it does not pass constitutional muster.

A memory card of a camera and photo paper are not an instrumentalities of interstate or foreign commerce. The evidence in the case regarding the memory card was that it was manufactured in Taiwan with materials from Korea and that it was found in Mr. McCloud's camera in Missouri.

A memory card or piece of paper is not by itself an instrumentality of interstate commerce. The holding is that simply because the camera was manufactured outside of the state, it is an instrumentality of interstate commerce. To follow this logic, homemade souvenirs and trinkets purchased on a vacation out of state would be an instrumentality of interstate commerce. Paper, pens, books, and food would fall under federal jurisdiction. Something that once *traveled* interstate is not necessarily interstate *commerce*.

The question then, for regulating instrumentalities of interstate commerce, hinges on the definition of those terms if indeed it does not include everything that has ever crossed a border. The cases defining these terms are quite old. Even *Lopez* in discussing category two cited to cases from 1914. *Lopez* at 558 citing to *Shreveport Rate Cases*, 234 U.S. 342 (1914); *Southern R. Co. v. United States*, 222 U.S. 20 (1911). In one of the first cases to talk about the Commerce Clause, Chief Justice Marshall in 1824 explained, "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824).

At some point, interstate *commerce* became synonymous with interstate *movement*. This notion is squarely opposed to explanation from Chief Justice Marshall in *Gibbons*. To hold that the only requisite to be a "thing" or "person" in interstate commerce is that it move

across state lines qualifies almost every person and every object as an "instrumentality."

If that were constitutional intent, then there would be no reason for the framers to be so cryptic in § 8, cl. 3 of Article I of the Constitution. There would be no reason for the learned members of the courts to spend 235 years interpreting that one sentence. Yet, to uphold the district court's ruling and, by effect, the jury's verdict, it is to uphold that very philosophy.

Furthermore, by means of the Dormant Commerce Clause, there is little, if anything, an individual state could regulate. This indeed, is a serious infringement on state sovereignty and states' rights. This Court must clarify the issue to draw the appropriate boundaries for federal legislative authority.

Instrumentalities: Means and Methods

Other courts' interpretation of "instrumentalities" suggests a less inclusive characterization. The Third Circuit in *United States v. Bishop* explained

> The Supreme Court has made clear that airplanes, railroads, highways and bridges constitute instrumentalities of interstate commerce which Congress can regulate under the Commerce Clause. E.g. *Lopez*, 115 S. Ct. at 1629 (airplanes); *Shreveport Rate Cases*, 234 U.S. 342, 58 L. Ed. 1341, 34 S. Ct. 833 (1914) (railroads); *Alstate Constr. Co. v. Durkin*, 345 U.S. 13, 97 L. Ed. 745, 73 S. Ct. 565 (1953) (highways); *Overstreet v. North Shore Corp.*, 318 U.S. 125, 129, 87 L. Ed. 656, 63 S. Ct. 494 (1943) (intrastate bridge over navigable waterway).

Bishop, 66 F.3d 569, 588 (3rd Cir. 1995). The *Bishop* court further explained that "[i]nstrumentalities differ from other

objects that affect interstate commerce because they are used as a *means* of transporting goods and people across state lines. Trains and planes are inherently mobile; highways and bridges, though static, are critical to the movement of automobiles." *Bishop* at 588 (emphasis added).

In its holding in *Lopez*, this Court cited to the *Shreveport Rate Cases* as authority for the instrumentalities prong of the commerce clause. There, the Court explained that it was Congress's authority to regulate the carriers

> as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.

Shreveport Rate Cases, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914).

The reasoning of the courts then, is that an instrumentality qualifies as a means or way of transportation in interstate commerce.

Despite specific research, Counsel was unable to locate any case holding that stated that a memory card for a camera—by nature of its out-of-state manufacture—was definitively an "instrumentality" of interstate commerce. Yet, the Eighth Circuit has specifically held, without reason or justification, that a memory card is satisfies the jurisdictional element of the offense. "[T]he evidence in this case includes proof that the offending images were stored on a digital memory card previously transported in interstate commerce. Mugan's convictions are therefore *tied* to interstate commerce, and therefore they are not

constitutionally infirm.") *Mugan* at 628 (emphasis added). Respectfully, "tied" to interstate commerce is not the standard for determining constitutionality.

Lopez and its progeny are quite specific about the three areas of regulation under the commerce clause and none include being "tied" to interstate commerce. Otherwise, a person that moves from one state to another, or from another country to this one, would have the potential to have everything they own be the subject of Federal legislation as it has all traveled in, and is thus "tied" to, interstate "commerce."

The memory card that travels as a part of interstate commerce allows Congress to legislate the transportation, buying, and selling of that memory card, not what an end consumer does with that card. Once the item is purchased, it is no longer an instrumentality of interstate commerce, but instead merely a possession. In the manufacturing and transient world in which we live, there would effectively be no limits on Congress's power under the Commerce Clause if the only requisite was that some person or thing involved in the situation had at some point moved across a border. To qualify as "commerce," more than mere travel is required.

Interstate Commerce And Travel: A Part of the Whole

"Commerce" and travel are not the same thing. To say that it was manufactured outside of this state and is now in this state is *per se* proof that it traveled in interstate "commerce" is an illogical leap. To argue otherwise equates commerce and travel and violates the very basic principle held by Chief Justice Marshall in *Gibbons v. Ogden* that "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." at 9.

Adopting a standard of simply moving in interstate commerce moves from the language of the Constitution,

which allows for "regulating commerce...among the states" to "regulating any activity in which something that once traveled among the states was utilized." "Commerce" itself would not be necessary for such a standard. Furthermore, adopting that definition would effectively take away any meaning from the Commerce Clause.

While interstate transportation is an essential element to interstate commerce, it is not enough on its own. Instead, commerce that causes interstate transportation is interstate commerce. "...[E]very negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce." *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 F. 1, 17 (8th Cir. 1907). In *Butler Bros. Shoe Co.*, the Eighth Circuit stated that the contract at issue "constituted and caused commercial intercourse between citizens of different states. Their chief purpose and their principal effect were the importation of sound articles of commerce into the state of Colorado from other states, and they necessarily constituted transactions of interstate commerce." At 17 (internal citations omitted).

A few years later, the Eighth Circuit further explained that "[b]uying and selling and the transportation incidental thereto constitute commerce." *Farmers' Grain Co. v. Langer*, 273 F. 635, 644 (8th Cir. 1921). *Farmers' Grain Co.* also quoted the Supreme Court in stating that "interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes, not only the transportation of persons and property and the navigation of public waters *for that purpose*, but also the purchase, sale, and exchange of commodities." At 644 (emphasis added; internal citations omitted).

Thus, while interstate travel in an element of interstate commerce, it is not, by itself, commerce. Travel is a part of the whole, not whole unto itself.

Constitutionality: Not As Written or As Applied

Several circuits have held 18 U.S.C. § 2251 to be constitutional because production of child pornography is an activity that substantially affects interstate commerce.[13] In applying that reasoning to *Lopez*, it is quite squarely a category three exercise of Congressional authority. Following the reasoning in *Raich*, the PROTECT Act is, by itself a constitutionally valid exercise of Congress's power under the commerce clause because it regulates activities of interstate commerce. Yet, the cases prosecuted under § 2251 are not prosecuted because they are regulation of an activity affecting interstate commerce, but because they are regulations of instrumentalities of interstate commerce.

The Eighth Circuit has somewhat addressed the instrumentalities issue in stating that "the statute ensures, through a case-by-case inquiry, that each defendant's pornography possession affected interstate commerce." *United States v. Bausch*, 140 F.3d 739, 741 (8th Cir. 1998). However, to follow this thinking, even though it is a category three exercise of Congressional authority, the government still must prove in each case that something in this crime has traveled in interstate commerce and thus, has affected it.

This does not line up with the *Raich* cases, which hold that if it is substantially affecting interstate commerce, it is enough to assert Federal jurisdiction. There would be no need to show that something used in the commission of the crime traveled in interstate commerce. Had a defendant used a memory card and paper that had been manufactured and sold in intrastate commerce, that would theoretically not affect the Federal government's jurisdiction under the activities category because the courts have already ruled that by itself, purely intrastate production of child pornography substantially affects interstate commerce.

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[13] *See* note 10, *supra*.

Yet, the statute continues to read that there must be an instrumentality of interstate commerce used in the commission of the crime. To apply the statute—as it reads, as it was pled, as it was tried, as it was applied to Mr. McCloud and every other defendant prosecuted under § 2251—it is a violation of Congress's authority under the commerce clause.

In keeping with the previous holdings of this Circuit on this issue, it places a burden on a citizen to contact manufacturers of everyday products to determine they have ever moved across a state line. This is completely impracticable and somewhat ludicrous to expect a citizen to go through such measures to avoid federal prosecution. A memory card and photo paper are not instrumentalities of interstate commerce. They are not a means or method of interstate commerce. They are merely goods or commodities that could, at some point potentially be shipped as part of an agreement that is an instrumentality of interstate commerce on a ship that is and instrumentality of interstate commerce though a navigation that is an instrumentality of interstate commerce. Once the card is inside of a camera of a consumer being used for the very purpose for which it was created, storing photographs, it is merely a possession. Once the paper has had a photo printed on it and is in the hands of a consumer being used for the very purpose for which it was created, storing photographs, it is merely an object of possession.

This Court must weigh in on these issues to properly guide the legislation and prosecution of these crimes. To assert federal jurisdiction over a crime because of the photo paper from Wal-Mart is intellectually offensive. The Commerce Clause, although written over 200 years ago, can still be relevantly applied in today's culture. But guidance from this Court is needed to establish the limits of Congressional authority. Limits that at this point are, practically speaking, non-existent.

This is not the language or the essence of the commerce clause. Review by this Court is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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March 2010

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 09-1520

United States of America,	*	
	*	
Appellee,	*	Appeal from the United
	*	States District Court for
v.	*	the Eastern District of
	*	Missouri.
Donnell McCloud,	*	
	*	
Appellant.	*	

Submitted: September 24, 2009
Filed: December 29, 2009

Before BYE, ARNOLD, and SMITH, Circuit Judges.

SMITH, Circuit Judge. Donnell McCloud was convicted of three counts of producing child pornography, in violation of 18U.S.C. § 2251(a), for taking photographs of three minor females engaged in sexually explicit conduct. McCloud raises five arguments for reversal, which include his argument that the government failed to prove that he produced the images and four arguments challenging the constitutionality of § 2251(a). For the reasons discussed below, we reject McCloud's arguments and affirm the judgment of the district court. [1]

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[1] The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

1. *Background*

In 2008, the St. Louis Police Department executed a search warrant at McCloud's apartment for narcotics and weapons. After entering the residence, officers observed McCloud—a 28-year-old male—dive out of his bedroom to the living room naked. A nude, 15-year-old female, K.G., was hiding under the bed. The officers seized a Kodak camera and computers from McCloud's apartment. The Kodak camera contained a Lexar 512 MB memory card. In turn, the memory card contained 12 videos. The videos, seven of which were shown to the jury, depict K.G. engaged in oral and vaginal sexual intercourse with McCloud or K.G.'s exposed genitals.

Law enforcement had previously investigated McCloud in 2004 for the statutory rape of G.D., a 14-year-old girl. At that time, Detective Karon Crocker went to McCloud's residence and spoke to Teresa Strong, McCloud's live-in girlfriend.

Strong gave Detective Crocker permission to search the residence for evidence of McCloud's relationship with G.D. Police found a scrap of paper with G.D.'s name on it hidden inside a stereo speaker. They seized numerous cameras from the residence, as well as a blue bag from the storage area of the basement containing hundreds of photographs depicting sexual acts with young females. According to Detective Crocker, the blue bag contained 96 photographs of G.D. in various stages of nudity and engaged in sexual acts. For example, ten of the photographs depicted G.D. displaying her nude genitals or engaged in sexual acts with a male. The photographs were printed on Fujicolor crystal archive photo paper. Detective Crocker testified that G.D. had identified the photographs as depicting her and McCloud and signed the backs of the photographs.

When Detective Joe Kuster arrested McCloud in 2008 for the statutory rape and sodomy of K.G., McCloud told Detective Kuster that he liked young teenage girls.

Thereafter, Detective Richard Noble reviewed the evidence from the 2004 statutory rape investigation of G.D. He examined the blue canvas bag that contained hundreds of photographs of young females that were clothed, partially clothed, nude, and engaged in sexual acts. He attempted to sort them by the females depicted in the photographs. During his examination, he found a 2003/2004 McCluer High School ID for C.W. He located approximately a hundred photographs of C.W. clothed or partially dressed and engaged in sexual acts. Detective Noble showed the photographs to C.W., who identified them as depicting her when she was 14 years old. Detective Noble testified at trial that eight of the admitted photographs depicted C.W. and that six of the photographs depicted her nude or performing oral sex. The photographs were printed on Fujicolor crystal archive photo paper.

McCloud was indicted on three counts of production of child pornography ("Counts 1, 5, and 6.").[2] Prior to trial, McCloud filed pretrial motions, and the district court held two separate evidentiary hearings. McCloud moved to dismiss, inter alia, Counts 1, 5, and 6 because (1) the government failed to show that the instrumentalities allegedly used traveled in or otherwise affected interstate commerce; (2) the memory card and the photo paper were not criminal instrumentalities; and (3) § 2251(a) is an unconstitutional exercise of Congress's authority under the Commerce Clause. The district court denied McCloud's motion to dismiss.

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[2] McCloud was originally charged with one count of production of child pornography, in violation of 18 U.S.C. § 2251. A superseding six-count indictment charged McCloud with three counts of production of child pornography, in violation of § 2251, and three counts of possession of child pornography, in violation of 18 U.S.C. § 2252A. Prior to trial, the government dismissed the three possession counts.

Thereafter, the government submitted a motion in limine to exclude any evidence, argument, or affirmative defense that McCloud was made to believe and did in fact mistakenly believe that some of the victims for the charge of production of child pornography were at least 18 years old. The district court granted the motion.

At trial, K.G.--the victim in Count 1--testified that she met McCloud on the UrbanChat page and that they communicated through UrbanChat, MySpace, and by telephone. K.G. told McCloud that she wanted to leave home and go to Wichita, Kansas, but he refused to take her. He agreed to buy her a Greyhound bus ticket to come to stay with him in St. Louis. K.G.--then age 14--traveled from Springfield, Missouri, to St. Louis, Missouri. McCloud took her to his apartment. Within a few days, McCloud engaged in oral and vaginal sexual intercourse with K.G. McCloud also took photographs of himself having oral and vaginal sex with K.G. K.G. identified the seven videos on the memory card as depicting McCloud having sex with her. She stated that McCloud took the videos.

The government admitted K.G.'s birth certificate into evidence, which showed that her date of birth was February 1, 1993. Thus, the birth certificate established that K.G. was 14 years old and then turned 15 years old during the alleged creation of the child pornography. K.G. acknowledged that her MySpace page stated that she was 17 years old. She said that she had a fake ID that represented her age to be 17.

The government introduced business records from Lexar Media, Inc. stating that the Lexar memory card was manufactured in Taiwan and shipped from Korea.

The forensic examiner, Brian Mize, testified that the memory card containing the child pornography was manufactured in Taiwan and shipped to the United States via Korea.

G.D. was the victim of Count 5. At trial, her birth certificate was admitted, which indicated that her date of

birth was June 5, 1990. Her death certificate attested that her date of death was May 7, 2005.

C.W. was the victim of Count 6. Her birth certificate was admitted into evidence attesting that her date of birth was May 2, 1989. C.W. testified that, when she was 14 years old and a freshman in high school, she met McCloud through a friend. She told McCloud that she was a freshman in high school and 14 years old.

She testified that she and McCloud engaged in oral and vaginal sex. According to C.W., McCloud took photographs of her nude and engaged in sexual intercourse with him. He took the photographs at his house and at his grandmother's house. McCloud ended the relationship because C.W. was turning 15 years old. C.W. identified herself as the girl in the photographs. She stated that McCloud took the photographs. She also testified that, in some of the photographs, she is performing oral sex on McCloud.

The government introduced business records from Fujifilm U.S.A., Inc.

("Fujifilm") into evidence. The records stated that Fujicolor crystal archive photo paper is primarily produced in Greenwood, South Carolina, and that a small percentage of the paper comes from the Netherlands. The business records indicate that the Greenwood plant was founded in 1988 and that the color paper portion of the plant opened in August 1996.

At the close of the government's case-in-chief, McCloud stated, "I'll move for an acquittal at the close of the government's evidence arguing to this court that the case is insufficient as a matter of law." The district court denied the motion.

McCloud testified that he met K.G. on the Internet. He purchased a bus ticket for her and picked her up from the Greyhound station. He started having sexual relations with her within a week. He testified that he had sex with C.W. for about six months. He stated that he takes

photographs of himself engaged in sexual activities with girlfriends. The blue bag was filled with photographs that he took over the course of his lifetime. He admitted that he had taken photographs of G.D. in the nude. He admitted that he took photographs of C.W. nude and engaged in oral sex. He also admitted that he took seven videos of K.G. that were shown to the jury.

During trial, the district court prohibited McCloud from introducing evidence that he was mistaken about the minors' true age.

McCloud made a motion for judgment of acquittal at the close of all evidence, and the district court denied it. The district court also overruled McCloud's proposed instruction regarding a mistake-of-age defense. The jury found McCloud guilty of all three counts. The district court sentenced McCloud to 30 years' imprisonment on Counts 1, 5, and 6 to run concurrently and imposed a lifetime of supervised release.

II. *Discussion*

On appeal, McCloud argues that (1) the district court erroneously denied his motion for judgment of acquittal at the close of all evidence with respect to Count 5 because the government failed to produce any evidence that McCloud actually produced the images or otherwise caused the images to be produced; (2) § 2251(a) is unconstitutional because it does not require knowledge of a minor's age and does not permit a reasonable-mistake-of-age defense, in violation of the First Amendment and the Fifth Amendment; (3) in the alternative, the district court erred in not permitting an affirmative mistake-of-age defense, as § 2251(a) does not preclude such a defense; (4) § 2251(a) is an unconstitutional exercise of Congress's authority under the Commerce Clause as applied to McCloud because the memory card and photo paper are not instrumentalities of interstate commerce; and (5) even if the memory card and photo paper are "instrumentalities," the government failed to prove that they traveled in interstate commerce.

A. *Sufficiency of the Evidence--Count 5*

First, McCloud challenges his conviction on Count 5 for producing child pornography involving G.D., in violation of 18U.S.C. § 2251(a), asserting that the government failed to produce any evidence that McCloud actually produced the images or otherwise caused the images to be produced. McCloud thus argues that the district court erroneously denied his motion for acquittal at the close of the government's evidence on Count 5.

In response, the government argues that the district court properly denied McCloud's motion for acquittal at the close of the government's case because it presented sufficient evidence that McCloud knowingly produced child pornography with G.D. Specifically, the government notes that it presented evidence that photographs of G.D.--nude and engaged in sexual acts with McCloud--were seized from a blue canvas bag in McCloud's residence. In that same bag were photographs of K.G. and C.W., and both K.G. and C.W. testified that McCloud engaged in sexual acts with them and photographed those acts.

"Under circumstances where a defendant presents evidence in his behalf after the denial of his motion for judgment of acquittal at the close of the Government's case, which defendant did in this case, we examine the evidence as a whole, including that offered by the defendant." *United States v. Wainright*, 351 F.3d 816, 822 (8th Cir. 2003). This is because "a defendant's decision to present evidence in his behalf following denial of his motion for a judgment of acquittal made at the conclusion of the Government's evidence operates as a waiver of his objection to the denial of his motion." *United States v. Thomas*, 987 F.2d 697, 702 (11th Cir. 1993) (internal quotations and citation omitted). A defendant who "offers rebuttal evidence . . . forgoes or waives appellate review of . . . the denial of the motion." *Id.* (internal quotations and citations omitted). "Because of the waiver rule, a defendant who presents the testimony of

himself or of others and asks the jury to evaluate his credibility (and that of his witnesses) against the government's case cannot insulate himself from the risk that the evidence will be favorable to the government." Id. (internal quotations, alterations, and citations omitted).

"We view the evidence in the light most favorable to the verdict and give the Government the benefit of all reasonable inferences that can logically be drawn from the evidence." *Wainright*, 351 F.3d at 822. "[I]f there is an interpretation of the evidence that would allow a reasonable-minded jury to find the defendant guilty beyond a reasonable doubt," then "[w]e must uphold the verdict." *Id.* We will not lightly overturn a jury's verdict. *Id.* Here, the jury convicted McCloud of violating § 2251(a). A defendant violates § 2251(a) when he

> employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct . . . .

A defendant "uses" a minor for purposes of § 2251(a) if he photographs the minor engaging in sexually explicit conduct to create a visual depiction of such conduct. *United States v. Fudl*, 498 F.3d 862, 866 (8th Cir. 2007).

McCloud concedes in his brief that he testified that he had a sexual relationship with G.D. and photographed her engaged in sexually-explicit conduct. Specifically, he states:

> On cross-examination during the defen[dant]'s case, Mr. McCloud made statements that he *did participate in a sexual relationship with*

> *[G.D.] and that he did at some point take photographs of her.* This argument is not for insufficiency of the evidence as a whole, simply that at the point in time when the Court was presented with the motion, the Government had not met its burden with respect to that count.

(Emphasis added.)

Because McCloud chose to testify after the district court denied his motion for judgment of acquittal at the close of the government's case-in-chief, we must take McCloud's testimony into account when considering whether sufficient evidence exists that McCloud "used, persuaded, or enticed" G.D. and produced the photographs of G.D. McCloud's own testimony defeats his argument, as it supplied the alleged "missing" element of whether McCloud actually photographed G.D.

Accordingly, we affirm McCloud's conviction as to Count 5.

B. *Constitutionality of 18U.S.C. § 2251(a)--First Amendment and Fifth Amendment*

Second, McCloud asserts that § 2251(a) is unconstitutional because it does not require a mens rea for the minor's age and does not permit a reasonable mistake-of-age defense, in violation of his freedom of speech under the First Amendment and his right to due process under the Fifth Amendment.

In response, the government argues that this court previously held in *United States v. Wilson*, 565 F.3d 1059 (8th Cir. 2009), that § 2251(a) does not violate the First Amendment even though it lacks a requirement that the defendant "know" the age of the minor. Likewise, it contends that the absence of a mistake-of-age defense under § 2251(a) does not violate due process because such an omission is consistent with the long history of the exception to the mens rea requirement in sex offenses.

Here, the district court granted the government's motion in limine to exclude any evidence, argument, or affirmative defense that McCloud was made to believe and did in fact mistakenly believe that some of the victims for the charge of production of child pornography were at least 18 years old. "We review a district court's grant of a motion in limine for abuse of discretion, and we accord it great deference on evidentiary rulings such as the admissibility of proffered testimony." *United States v. Fincher*, 538 F.3d 868, 872 (8th Cir. 2008) (internal citations omitted). However, we apply de novo review to a district court's legal conclusions. *Id.*

McCloud concedes in his brief that this court has already held that disallowing a mistake-of-age defense does not violate a defendant's First Amendment rights. In *Wilson*, we held that "the First Amendment does not require a reasonable-mistake-of age defense to charges of producing child pornography in violation of section 2251(a)." 565 F.3d at 1069; *see also United States v. Pliego*, 578 F.3d 938, 942-43(8th Cir. 2009) (holding that district court did not (1) abuse its discretion in refusing to instruct the jury that knowledge of the victim's age is an element of the offense or (2) err in ruling that defendant could not raise his lack of knowledge of the victim's age as an affirmative defense).

But McCloud maintains that the "central issue" is whether precluding a defendant from presenting a reasonable-mistake-of-age defense violates his Fifth Amendment right to due process. We addressed a similar argument in *Wilson*. In that case, the defendant argued "that his due process rights were violated because the jury was not instructed that the government must prove he knew the Victim's age." 565 F.3d at 1066. The defendant did acknowledge that § 2251(a) "contains no scienter requirement." *Id.* (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 76 n.5 (1994) ("producers may be convicted under § 2251(a) without proof they had

knowledge of age"); *United States v. Deverso*, 518 F.3d 1250, 1257 (11th Cir. 2008)).

The defendant's "sole argument for requiring the government to prove knowledge of the Victim's age [was] the fact that the government in a previous production-of-child-pornography case, *United States v. Kent*, 531 F.3d 642 (8th Cir. 2008), did not object to a jury instruction requiring proof of knowledge as an element of the offense." *Id.* We held that Kent had "no relation to the current case and the district court did not abuse its discretion when it denied [the defendant's] request to include a scienter requirement in the jury instructions." *Id.*

Following Wilson, we held that a district court did not (1) abuse its discretion in refusing to instruct the jury that knowledge of the victim's age is an element of the offense of producing child pornography or (2) err in ruling that the defendant could not raise his lack of knowledge as an affirmative defense. *Pliego*, 578 F.3d at 942-43.

In *Pliego*, the defendant first argued that the district court erroneously refused to "instruct the jury that knowledge of the victim's age is an element of § 2251(a)," despite his concession that the statute "does not contain an express scienter requirement." *Id.* at 942. Instead, the defendant relied on *X-Citement Video* in support of his argument that "knowledge of the victim's age is an element of the offense and that the jury should have been instructed accordingly." *Id.* We rejected the defendant's argument, highlighting "the Supreme Court's explicit statement that a defendant may be convicted under § 2251(a) without proof that he or she had knowledge of the victim's age." *Id.* at 943 (citing *X-Citement Video*, 513 U.S. at 76 n.5).

Next, the defendant in *Pliego* contended that the district court erroneously ruled that he could not raise a reasonable-mistake-of-age defense, relying on--as McCloud does in the present case--*United States v. U.S. District Court for the Central District of California*, 858 F.2d 534 (9th Cir. 1988). *Id.* "In that case, the Ninth Circuit held

that, although '[t]he defendant's awareness of the subject's minority is not an element of § 2251(a), 'the [F]irst [A]mendment requires a reasonable mistake of age defense.'" *Id.* (quoting *Central District*, 858 F.2d at 538, 542). But we rejected the defendant's argument, explaining that "we declined to adopt the Ninth Circuit's rationale" in Wilson. Id. (citing *Wilson*, 565 F.3d at 1067-69); *see also United States v. Malloy*, 568 F.3d 166 (4th Cir. 2009) (rejecting defendant's argument that his due process rights were violated by not being able to present a mistake-of-age defense under § 2251 because "the evidence that [the defendant] wished to present in his defense was irrelevant to the crime charged and, therefore, it was properly excluded by the district court").

In accordance with our prior precedents in *Wilson* and *Pliego*, we hold that the district court's preclusion of a reasonable-mistake-of age defense did not violate McCloud's right to due process.[3]

C. *Commerce Clause*

Third, McCloud maintains that § 2251(a) is an unconstitutional exercise of Congress's authority under the Commerce Clause. McCloud contends that the government failed to show that the memory card and photo paper were instrumentalities of interstate commerce. According to McCloud, "In stating that some object that was utilized during the commission of the crime is an 'instrumentality of interstate commerce' simply because it was manufactured outside the state is beyond the scope of the commerce

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[3] McCloud makes an alternative argument that a lack of a mens rea element in § 2251(a) does not necessarily preclude an affirmative defense. As in Malloy, 568 F.3d at 177, we view the argument of whether § 2251(a) permits a reasonable mistake-of-age defense as an evidentiary one and hold, based on our prior analysis, *see* Part II.B., that the district court did not abuse its discretion in refusing to admit such defense evidence.

clause." In the alternative, McCloud argues that even if this court holds that the memory card and photo paper are "instrumentalities," the government failed to prove that those items traveled in interstate commerce.

In response, the government points out that this court has repeatedly held that § 2251(a) is a valid exercise of the Commerce Clause where jurisdiction is based on evidence that the materials used to produce the child pornography traveled in interstate commerce. Furthermore, it asserts that sufficient evidence exists that the items traveled in interstate or foreign commerce.

1. Whether § 2251 is a Constitutional Exercise of Congress's Authority

"[W]e have previously upheld the validity § 2251 against Commerce Clause attack." Phiego, 578 F.3d at 944 (citing United States v. Betcher, 534 F.3d 820, 824 (8th Cir. 2008) (rejecting the defendant's argument that "the mere transportation across state or international lines of cameras used in the manufacture of child pornography does not constitute an impact upon interstate commerce sufficient to form a jurisdictional basis upon which Congress could validly prohibit the charged conduct under its Commerce Clause powers")). As a result, McCloud's "argument that § 2251(a) exceeds Congress's authority under the Commerce Clause is without merit." *Id.*

2. Sufficiency of the Evidence--Memory Card and Photo Paper

In the alternative, McCloud argues that no evidence exists that the memory card or photo paper traveled in interstate commerce. First, he asserts that there is no evidence of how the memory card got from Taiwan to Missouri. According to McCloud, the government essentially drew the inference that the memory card "necessarily traveled in interstate *commerce* because it traveled interstate"; there was no evidence of how the

memory card got into McCloud's possession. He hypothesizes that he could have purchased the card in Taiwan and brought it home with him or received it as a gift from someone that purchased it in another country.

With regard to the photo paper, he argues that the government presented no evidence about how this paper--which was at least four years old--was manufactured. He contends that there was no evidence that the company that manufactured the paper produced it in South Carolina or the Netherlands, nor was there any evidence regarding how long the manufacturing operations had been in place or how the paper was shipped in interstate commerce.

According to the government, McCloud's argument that the government was required to show that he did not purchase the memory card in Taiwan and carry it to the United States fails both legally and factually. First, the government maintains that this court has rejected the argument that a camera's crossing state lines and subsequent use to produce child pornography was not sufficient to establish a jurisdictional nexus under the Commerce Clause. *See Fadl*, 498 F.3d at 866. Second, the government asserts that the evidence established that the memory card "according to the records was manufactured in Taiwan and then shipped to the United States via Korea."

In *Fadl*, the defendant asserted that § 2251(a) was unconstitutionally applied to his case because he did not transmit any images of child pornography across state lines and the government presented no evidence that he had intended to do so. 498 F.3d at 865-66. In rejecting the defendant's argument, we cited the defendant's acknowledgment "that he used cameras that had crossed state lines to take the photographs." *Id.* We observed that this court "has on a number of occasions held that the use of a camera that has moved in interstate commerce provides a sufficient jurisdictional nexus to punish the production of child pornography under the Commerce

Clause." *Id.* (citing *United States v. Mugan*, 441 F.3d 622 (8th Cir. 2006) (holding that federal statute prohibiting local production of child pornography using materials that had moved in interstate commerce was not unconstitutional as applied to defendant; defendant had taken digital pictures of himself engaging in intercourse with his 13-year-old daughter and then stored images on digital memory card, which had previously been transported in interstate commerce, and storage of images on digital card placed them on medium which would permit immediate and widespread dissemination over the internet)).

Here, all the government had to prove was that the memory card "crossed state lines." See Fadl, 498 F.3d at 866. Therefore, even if McCloud purchased the memory card and carried it to the United States, the product still "crossed state lines." The records admitted into evidence established that the memory card was manufactured in Taiwan and then shipped to the United States via Korea. Therefore, the government sufficiently proved that the memory card used to produce the sexually explicit images of K.G. traveled in interstate or foreign commerce.

In response to McCloud's argument that the government failed to show that the South Carolina plant that manufactured the Fujicolor crystal archive photo paper was operating in 2004--when the printed photographs of child pornography were seized from McCloud's residence--the government asserts that the Fujifilm records admitted into evidence showed that the color paper portion of the Greenwood, South Carolina plant opened in August 1996. Thus, the government argues that it established that the Fujifilm crystal archive photo paper used to produce the child pornography of C.W. and G.D. had traveled in interstate commerce.

The government is correct that the Fujifilm records admitted into evidence showed that the color paper portion of the Greenwood, South Carolina plant opened in August 1996. Government's exhibit 65 is a letter from Douglas

Fachnic of Fujifilm to Carrie Constantin, an Assistant United States Attorney. The letter provides, in relevant part:

> The following documents confirm that the Fujicolor Crystal Archive line of paper that is marketed in the United States is primarily produced in Greenwood, South Carolina. A small percentage of the paper also comes from Tilburg, Netherlands.
>
> Enclosed you will find a Powerpoint presentation routinely presented to industry members, media and our larger customers. The "Product Lines" slide of this presentation highlights color photographic paper as one of the products produced in FUJIFILM U.S.A., Inc's Greenwood, South Carolina facility. In addition, enclosed is a FUJIFILM Product Information Bulletin provided to photographic labs using this paper.
>
> Page 4 of this Bulletin features the product's box marking and brand imprint on which its Greenwood, South Carolina production location is clearly labeled.
>
> The foregoing records are maintained as part of FUJIFILM U.S.A., Inc.'s ordinary course of business and are routinely relied upon in the course of business at FUJIFILM U.S.A., Inc.
>
> Based upon the foregoing information, I can assert that Fujicolor Crystal Archive Paper is not produced in the State of Missouri, but rather is produced in the State of South Carolina and The Netherlands. The attached information is a true and accurate summary of the origin of Fujicolor Crystal Archive Paper.

In the records that Fachnie provided, a Powerpoint slide specifically states "August 1996--Color Paper Plant Opens." Thus, the record evidence supports a conclusion that the South Carolina plant manufactured the paper when the printed photographs of child pornography were seized from McCloud's residence in 2004.

Accordingly, sufficient evidence exists from which a jury could find that McCloud produced child pornography with materials that had traveled in interstate commerce.

III. *Conclusion*

Accordingly, we affirm the judgment of the district court.

No. 09-1177

In the Supreme Court of the United States

DONNELL MCCLOUD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2251(a), which criminalizes the production of child pornography, violates either the Free Speech Clause of the First Amendment or the Due Process Clause of the Fifth Amendment unless it is construed to include a reasonable-mistake-of-age affirmative defense.

2. Whether 18 U.S.C. 2251(a) exceeds Congress's power under the Commerce Clause as applied to the intrastate production of child pornography where the materials used to produce the pornographic images have moved in interstate or foreign commerce.

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In the Supreme Court of the United States

No. 09-1177

DONNELL MCCLOUD, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 590 F.3d 560.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2009. The petition for a writ of certiorari was filed on March 25, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on three counts of producing child pornography,

in violation of 18 U.S.C. 2251(a).[1] He was sentenced to 30 years of imprisonment, to be followed by supervised release for life. The court of appeals affirmed. Pet. App. 1a-17a.

1. In February 2008, upon entering petitioner's apartment to execute a search warrant for illegal drugs and weapons, law enforcement officers observed petitioner, who was nude, dive out of the bedroom into the living room. The police then found K.G., a 15-year-old girl, hiding under the bed, also nude. During the ensuing search, the police found a memory card for a camera that contained seven videos of K.G. and petitioner, who was 28 years old, engaging in sexual activity. At the time of his arrest, petitioner told the arresting officer that he liked young teenage girls. Pet. App. 2a, 4a; Gov't C.A. Br. 3-4.

Petitioner had met K.G. on an Internet chat page in December 2007. Petitioner provided K.G. with a bus ticket so she could leave her home in Springfield, Missouri, and come to stay with him in St. Louis. When K.G., then 14 years old, arrived in St. Louis, petitioner took her to his apartment. Within a few days, petitioner engaged in oral and vaginal sexual intercourse with K.G. Petitioner then began taking pictures of himself engaging in sexual acts with K.G. Pet. App. 2a, 4a; Gov't C.A. Br. 3-4.

Law enforcement officers had previously investigated petitioner in 2004 for the statutory rape of G.D., a 14-year-old girl. A search of petitioner's residence at that time uncovered a blue bag in the basement containing hundreds of photographs of young females engaging

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[1] All references to 18 U.S.C. 2251(a) are to the current version, which is contained in the 2008 Supplement to the United States Code.

in sexual acts. Ninety-six of the photographs depicted G.D. Ten of these showed G.D. displaying her nude genitals or performing oral sex. G.D. identified herself as the female depicted in the photographs and signed the backs of them. Pet. App. 2a; Gov't C.A. Br. 5-6.

The police reviewed the photographs in the blue bag and identified a third victim, C.W. There were over 100 photographs of C.W. clothed or partially dressed and engaging in sexual acts. C.W. identified herself in the pictures and said that she was 14 years old when they were taken. C.W. said she met petitioner while she was a freshman in high school, that she and petitioner engaged in oral and vaginal sex, and that petitioner took photographs of her while she was nude and while she was engaging in sexual acts with him. Petitioner ended his relationship with C.W. because she was turning 15. Pet. App. 3a, 5a; Gov't C.A. Br. 7-9.

At trial, petitioner acknowledged that he had taken the pictures and videos of K.G., G.D., and C.W. that were found at his residence. Pet. App. 6a; Gov't C.A. Br. 8-9.

In order to satisfy the interstate or foreign commerce requirement of 18 U.S.C. 2251(a), the government introduced evidence at trial that the memory card containing the pictures of K.G. was manufactured in Taiwan and shipped to the United States via Korea. The government also showed that the Fuji photo paper on which the pictures of G.D. and C.W. were printed was produced either in Greenwood, South Carolina, or the Netherlands. Pet. App. 4a-5a; Gov't C.A. Br. 5, 8.

2. A grand jury in the Eastern District of Missouri returned a superseding indictment charging petitioner with three counts of producing child pornography, in violation of 18 U.S.C. 2251(a), and three counts of pos-

sessing child pornography, in violation of 18 U.S.C. 2252A. Before trial, the government dismissed the three possession counts. Pet. App. 3a & n.2.

Petitioner moved to dismiss the indictment on the ground that Section 2251(a) is unconstitutional as applied to the intrastate production of child pornography, where the materials used to produce the pornographic images have moved in interstate or foreign commerce. The district court denied that motion. Pet. App. 3a.

The government then filed a motion in limine to exclude any evidence, argument, or affirmative defense that petitioner was reasonably mistaken about his victims' ages. The district court granted the motion. Pet. App. 4a. Petitioner sought a jury instruction stating that there is an affirmative defense for a reasonable mistake about the victims' ages. The district court declined to give that instruction. *Id.* at 6a.

The jury found petitioner guilty on all counts. He was sentenced to 30 years of imprisonment, to be followed by a supervised release for life. Pet. App. 6a.

3. The court of appeals affirmed. Pet. App. 1a-17a. As relevant here, the court rejected petitioner's argument that Section 2251(a) violates the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment because it does not require knowledge of the victim's age and does not include a reasonable mistake-of-age affirmative defense. *Id.* at 9a-12a. The court noted that it had already rejected the First Amendment challenge in *United States* v. *Wilson*, 565 F.3d 1059, 1066-1069 (8th Cir. 2009), cert. denied, 130 S. Ct. 1052 (2010), and *United States* v. *Pliego*, 578 F.3d 938, 943-944 (8th Cir. 2009), cert. denied, 130 S. Ct. 1109 (2010).

Relying on this Court's decision in *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994), the *Wilson* court drew a distinction between distributors and downstream consumers of child pornography, on the one hand, and producers of child pornography, on the other, explaining that the latter are akin to statutory rapists who are not entitled to any *mens rea* safeguards. 565 F.3d at 1067. The court further explained that given the opportunity that producers have to verify the ages of the actors they employ, their speech is "less apt to be inhibited by the fear of mistake or deception." *Id.* at 1068-1069. The court concluded that these two factors, combined with the "strong interest * * * in protecting children from sexual exploitation," defeated the First Amendment challenge. *Ibid.*

The court of appeals then rejected petitioner's due process challenge to Section 2251(a), stating that it had rejected a similar argument in *Wilson*. Pet. App. 10a-11a. The court noted that Section 2251(a) does not include a *mens rea* element or a reasonable-mistake-of-age defense on its face, and it concluded that the district court did not abuse its discretion in failing to give the requested jury instruction. *Id.* at 10a-12a & n.3.

Finally, the court rejected petitioner's Commerce Clause challenge to Section 2251(a). Pet. App. 13a-17a. Relying on its earlier decisions in *Pliego*, 578 F.3d at 944, and *United States* v. *Betcher*, 534 F.3d 820, 823-824 (8th Cir. 2008), cert. denied, 129 S. Ct. 962 (2009), the court held that Congress may criminalize child pornography production using materials that have traveled in interstate or foreign commerce, and it found that the government had proved interstate and foreign transportation of such materials in this case. Pet. App. 13a-17a.

ARGUMENT

1. Petitioner renews his arguments (Pet. 8-22) that 18 U.S.C. 2251(a) violates the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment unless it is construed to include a reasonable-mistake-of-age affirmative defense. The court of appeals correctly rejected those claims. Petitioner contends (Pet. 9-11) that the decision below conflicts with a decision of the Ninth Circuit. But the Ninth Circuit's decision was issued before this Court's decision in *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994), which distinguished between producers of child pornography and distributors and explained that the former may be held responsible for their actions without regard to their knowledge of the victim's age. Since *X-Citement Video*, the circuits have not disagreed on that issue, and there is therefore no reason for this Court to intervene at this time. In any event, review is unwarranted because petitioner could not prevail even under the Ninth Circuit's pre-*X-Citement Video* standard. The Court has recently denied certiorari on the First Amendment issue. See *Malloy* v. *United States*, 130 S. Ct. 1736 (2010) (No. 09-523); *Wilson* v. *United States*, 130 S. Ct. 1052 (2010) (No. 09-6491). The same result is warranted here.

a. Section 2251(a) criminalizes the production of child pornography in interstate commerce. It applies to "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct * * * if that visual depiction was produced or transmitted using materials" transported in interstate or foreign

commerce. 18 U.S.C. 2251(a). The statute does not require that the defendant know that the victim is a minor, nor does it contain an express affirmative defense for a reasonable mistake about the victim's age. See *X-Citement Video*, 513 U.S. at 76 & n.5. As this Court has observed, Congress intended to hold producers of child pornography criminally liable even in the absence of evidence that they knew the age of their victims, so long as the victims actually were children. See *id.* at 74-77.

In *X-Citement Video*, the Court held that 18 U.S.C. 2252, which makes it a crime "knowingly" to transport, receive or distribute child pornography, requires that the defendant know that at least one of the performers depicted pornographically was a minor. 513 U.S. at 78. In so holding, the Court distinguished between distributers and producers of child pornography, explaining that "producers may be convicted under § 2251(a) without proof they had knowledge of age." 513 U.S. at 72 n.2, 76-77 & n.5. The Court compared a Section 2251 offense to statutory rape, observing that with both offenses, "the victim's actual age [i]s determinative despite defendant's reasonable belief that the girl had reached age of consent." *Id.* at 72 n.2 (citation omitted). The Court explained that it "makes sense to impose the risk of error on producers," because, as compared with distributors or possessors of child pornography, they "are more conveniently able to ascertain the age of performers." *Id.* at 76 n.5.[2]

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[2] Petitioner asserts (Pet. 16-17) that while "commercial manufacturers" of child pornography may easily verify the victim's age, amateur pornographers like himself may not. But in either event, the producer of the child pornography deals directly with his victim, and is therefore in a position to ascertain the victim's age, much like statutory rapists who have traditionally been denied a mistake-of-age defense. See *X*

Petitioner is mistaken in contending that Section 2251 violates the First Amendment on its face. As this Court explained in *United States* v. *Williams*, 553 U.S. 285 (2008), under the "First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." *Id.* at 292. See also *United States* v. *Stevens*, 130 S. Ct. 1577, 1587 (2010). The doctrine "strike[s] a balance between competing social costs," balancing "the threat of enforcement of an overbroad law," which "deters people from engaging in constitutionally protected speech," against the "obvious harmful effects" of "invalidating a law that in some of its applications is perfectly constitutional." *Williams*, 553 U.S. at 292.

Section 2251(a) reaches only depictions of real children engaging in sexually explicit conduct, which lack First Amendment protection. See 18 U.S.C. 2251(a); *New York* v. *Ferber*, 458 U.S. 747, 764 (1982). The statute does not apply to pornographic material with

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Citement Video, 513 U.S. at 72 n.2, 76 n.5 ("producers are more conveniently able to ascertain the age of performers"; "the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim's age").

Petitioner suggests (Pet. 12) that some States allow a mistake-of-age affirmative defense to statutory rape. That is beside the point. The federal statutory rape statute, 18 U.S.C. 2241(c), does not require that the defendant know his victim's age, see, *e.g.*, *United States* v. *Ransom*, 942 F.2d 775, 777 (10th Cir. 1991), cert. denied, 502 U.S. 1042 (1992). And the question here is not whether Congress could allow such a defense, but whether the statute is unconstitutional without such a defense, which it is not. In any event, the "majority" of American courts "that have considered this issue have rejected the reasonable mistake of age defense to statutory rape, absent express legislative directive." *United States* v. *Brooks*, 841 F.2d 268, 270 (9th Cir.), cert. denied, 487 U.S. 1227 (1988).

youthful-looking adult actors or to virtual child pornography. Cf. *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 250-251 (2002) (invalidating statute criminalizing production of virtual child pornography). Petitioner has not identified *any* application of Section 2251(a) that would reach constitutionally protected expression. Because Section 2251(a) reaches only unprotected speech, it is not overbroad. See, *e.g.*, *United States* v. *Johnson*, 376 F.3d 689, 694-696 (7th Cir. 2004).

But even if a statute reaching only unprotected speech could be subject to challenge because of its chilling effect on protected speech, Section 2251(a) does not substantially chill producers of adult pornography. The only material potentially affected by Section 2251(a) is the subset of pornography involving youthful-looking adult actors. *United States* v. *Malloy*, 568 F.3d 166, 175-176 (4th Cir. 2009), cert. denied, 130 S. Ct. 1736 (2010). The relative ease with which pornography producers can verify their subjects' ages, see *X-Citement Video*, 513 U.S. at 76 n.5, suggests that Section 2251(a) will not deter production of otherwise-lawful pornography involving youthful-looking adults so much as encourage producers of such material to verify their subjects' ages, as they are already required to do by a separate criminal statute, see 18 U.S.C. 2257(b)(1). The First Amendment therefore does not require engrafting a reasonable-mistake-of-age affirmative defense onto 18 U.S.C. 2251(a).

b. Every court of appeals that has addressed the issue since this Court's decision in *X-Citement Video* has held that the First Amendment does not require a reasonable-mistake-of-age defense in Section 2251(a) cases. See *Malloy*, 568 F.3d at 172-176; *Wilson*, 565 F.3d at 1067-1069; *United States* v. *Deverso*, 518 F.3d

1250, 1258 (11th Cir. 2008); see also *Gilmour* v. *Roger-son*, 117 F.3d 368, 372-373 (8th Cir. 1997) (reaching same conclusion with respect to state statute criminalizing production of child pornography), cert. denied, 522 U.S. 1122 (1998).

Before *X-Citement Video*, the Ninth Circuit had held that Section 2251(a) would be unconstitutional in the absence of a reasonable-mistake-of-age defense. See *United States* v. *United States Dist. Ct.*, 858 F.2d 534, 543-544 (1988). That case involved unique facts: a "massive fraud" on the entire "adult entertainment industry" perpetrated by a minor who was an aspiring adult film actress and her agent, such that even those producers who took "the most elaborate steps to determine how old" their subject was would have been fooled. *Id.* at 536, 540. A divided panel of the court observed that the First Amendment "does not permit the imposition of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech," and it determined that not allowing a reasonable-mistake-of-age defense under the circumstances would have that effect. *Id.* at 540-541. The court therefore decided to "engraft" a "very narrow" affirmative defense "onto [the] statute," which would permit a defendant to escape liability if he proved, "by clear and convincing evidence, that he did not know, and could not reasonably have learned, that the actor or actress was under 18 years of age." *Id.* at 542-543 (footnote omitted).

The Ninth Circuit's decision relied in significant part on cases involving distributors and possessors of child pornography—as opposed to producers. See *United States Dist. Ct.*, 858 F.2d at 539. Because *X-Citement Video* later explained that producers of child pornography should be treated differently from distributors of

such material—specifically stating that "producers may be convicted under § 2251(a) without proof they had knowledge of age," 513 U.S. at 76 n.5—the Ninth Circuit's decision does not create a conflict warranting this Court's review. The Ninth Circuit has not had an opportunity to reassess its position in light of *X-Citement Video* and other courts' decisions that relied on *X-Citement Video* to reject First Amendment challenges to Section 2251(a). The court of appeals should be permitted that opportunity, particularly because it stated that its holding was based on its "reading of the relevant Supreme Court opinions" and was valid "[u]nless and until the Supreme Court speaks otherwise." *United States Dist. Ct.*, 858 F.2d at 540, 542. Review by the Court at this time would be premature.

c. Even if the disagreement in the circuits otherwise warranted this Court's review, this case would not be a suitable vehicle for resolving the issue because petitioner would not prevail even under the affirmative defense recognized by the Ninth Circuit. The Ninth Circuit adopted a "very narrow" affirmative defense, requiring a defendant to show, by clear and convincing evidence, not only that he "did not know" that the subject was underage, but also that he "could not reasonably have learned" his subject's true age. *United States Dist. Ct.*, 858 F.2d at 543. The court of appeals noted that "[s]uch a defense would be entirely implausible under most circumstances" and should be limited to "rare" cases, such as "where the actress allegedly engaged in a deliberate and successful effort to deceive the entire industry." *Id.* at 542-543.

This is not that "rare" case. Here, petitioner makes no argument that he was reasonably mistaken about his victims' ages. And any such assertion would ring hollow

in light of petitioner's own statement to the police that he "like[s] young teenage girls," as well as the fact that he ended his relationship with one of his victims when she turned 15 years old. Pet. App. 2a-5a. These facts readily distinguish *United States District Court*, where the defendants claimed that the child victim provided them with fraudulent "California photographic identification" and "other official documents," and evidence that she had already been employed by "men's magazines" and other employers who, "according to industry custom and perception, reliably investigate the age of their models." 858 F.2d at 540.[3] Because petitioner would not prevail under the Ninth Circuit's pre-*X-Citement Video* standard, further review of his First Amendment claim is unwarranted.

d. Petitioner also is mistaken in contending (Pet. 15-22) that Section 2251(a) violates due process unless construed to include a *mens rea* element or a reasonable-mistake-of-age affirmative defense. Petitioner does not identify any court that has accepted this argument or any disagreement in the circuits on this issue. Review should be denied for that reason alone.

In any event, the court of appeals correctly rejected petitioner's due process claim. Although criminal offenses typically require a "concurrence of an evil-meaning mind with an evil-doing hand," *Morissette* v. *United States*, 342 U.S. 246, 251-252 (1952), this Court has recognized that there is a long-established exception for crimes involving the sexual exploitation of children, "in which the victim's actual age [is] determinative despite

[3] Petitioner asserts (Pet. 7) that there is evidence that one victim, K.G., had shown him fake identification. But K.G. testified that her fake identification stated she was 17 years old, Pet. App. 4a, which is still below the federal age of majority, see 18 U.S.C. 2256(1).

defendant's reasonable belief that the girl had reached [the] age of consent." *Id.* at 251 n.8. In light of this exception, the courts of appeals have uniformly rejected due process challenges to the absence of a scienter requirement from statutory rape provisions. See, *e.g.*, *United States* v. *Juvenile Male*, 211 F.3d 1169, 1170-1171 (9th Cir.), cert. denied, 531 U.S. 907 (2000); *United States* v. *Ransom*, 942 F.2d 775, 777 (10th Cir. 1991), cert. denied, 502 U.S. 1042 (1992); *Nelson* v. *Moriarty*, 484 F.2d 1034, 1035-1036 (1st Cir. 1973).[4]

Child pornography statutes targeting producers are analogous to statutory rape provisions and thus fall squarely within the category of crimes for which a scienter requirement is not traditionally required. See, *e.g.*, *X-Citement Video*, 513 U.S. at 72 n.2; *Wilson*, 565 F.3d at 1067. The "long history" of the exception for sex offenses against children "undermines [the] argument that the statute in question offends principles of justice deeply rooted in our traditions and conscience." *Ransom*, 942 F.2d at 777. Moreover, Section 2251(a) "does not impinge on other protected constitutional rights," and the statute furthers the paramount government interest in protecting children from sexual exploitation. *Ibid.* As this Court explained in *X-Citement Video*, imposing "the risk of error" on producers of child pornography "makes sense," 513 U.S. at 76 n.5, and is "reason-

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[4] Petitioner cites (Pet. 10-11, 13) cases in which the courts have adopted extra-statutory affirmative defenses for entrapment and self-defense. But such affirmative defenses are recognized only to the extent that they do not contravene the intent of Congress. See, *e.g.*, *Rouse* v. *DeBruyn*, 17 F.3d 1047, 1052 (7th Cir.), cert. denied, 513 U.S. 969 (1994). Here, Congress wanted to hold producers of child pornography responsible regardless of their knowledge of their victims' ages. See *X-Citement Video*, 513 U.S. at 76 & n.5.

abl[e]," *id.* at 72 n.2, because "the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim's age," *ibid.* Accordingly, due process does not require that Section 2251(a) include either a knowledge-of-age element or mistake-of-age affirmative defense.

2. Petitioner renews his argument (Pet. 22-32) that a Section 2251(a) prosecution for intrastate production of child pornography, where the materials used to produce the pornographic images have moved in interstate or foreign commerce intrastate, exceeds Congress's authority under the Commerce Clause. Petitioner has not identified any disagreement in the circuits on this issue. Indeed, the courts of appeals that have addressed the issue have uniformly upheld the constitutionality of Section 2251(a) in materials-in-commerce cases. See, *e.g.*, Pet. App. 13a; *United States* v. *Blum*, 534 F.3d 608, 609-612 (7th Cir.), cert. denied, 129 S. Ct. 589 (2008); *United States* v. *Smith*, 459 F.3d 1276, 1282-1285 (11th Cir. 2006), cert. denied, 549 U.S. 1137 (2007)[*]; *United States* v. *Grimmett*, 439 F.3d 1263, 1271-1273 (10th Cir. 2006); *United States* v. *Forrest*, 429 F.3d 73, 77-79 (4th Cir. 2005); *United States* v. *Mugan*, 394 F.3d 1016, 1020-1024 (8th Cir.), vacated and remanded on other grounds, 546 U.S. 1013 (2005); *United States* v. *Morales-De Jesus*, 372 F.3d 6, 10-17 (1st Cir. 2004), cert. denied, 545 U.S. 1130 (2005); *United States* v. *Holston*, 343 F.3d 83, 84-91

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[*] The Eleventh Circuit previously came to a contrary conclusion in *United States* v. *Smith*, 402 F.3d 1303, 1315-1316 (2005), but this Court vacated that decision in light of *Gonzales* v. *Raich*, 545 U.S. 1 (2005). See *United States* v. *Smith*, 545 U.S. 1125 (2005). On remand, the Eleventh Circuit "rather easily" concluded that, in light of *Raich*, the application of the statute to the defendant's purely intrastate production of child pornography was constitutional. *Smith*, 459 F.3d at 1284-1285.

(2d Cir. 2003); *United States* v. *Rodia*, 194 F.3d 465, 473-482 (3d Cir. 1999), cert. denied, 529 U.S. 1131 (2000). Those courts are correct.

In *United States* v. *Lopez*, 514 U.S. 549 (1995), this Court identified three categories of activity that Congress may regulate under its commerce power: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. *Id.* at 558-559. Thereafter, in *United States* v. *Morrison*, 529 U.S. 598 (2000), the Court identified four factors to be considered in determining the existence of a "substantial effect" on commerce: (1) whether the activity the statute proscribes is commercial or economic in nature; (2) whether the statute contains an express jurisdictional element involving interstate commerce that might limit its reach; (3) whether Congress has made specific findings regarding the effect of the proscribed activity on interstate commerce; and (4) whether the link between the proscribed conduct and a substantial effect on commerce is attenuated. *Id.* at 610-612.

Materials-in-commerce prosecutions under Section 2251(a) are a constitutional exercise of the Commerce Clause power because the production of child pornography substantially affects interstate commerce. The ban on production of child pornography in Section 2251(a) is an integral feature of a statutory scheme directed at large-scale commercial activity. Congress has long recognized that the production and marketing of child pornography is "a large industry * * * that operates on a nationwide scale and relies heavily on the use of the mails and other instrumentalities of interstate and foreign commerce." S. Rep. No. 438, 95th Cong., 1st Sess.

6-7 (1977) (*Senate Report*). Section 2251(a)'s ban on the intrastate production of child pornography effectuates the ban on interstate trafficking, because it reduces the demand for child pornography, thereby reducing the interstate market for such material. See *Rodia*, 194 F.3d at 477.

Each factor identified in *Morrison* supports the conclusion that the intrastate production of child pornography using materials that traveled in commerce substantially affects interstate or foreign commerce. First, the conduct at issue is economic in character. As the Fifth Circuit has explained, "homemade" child pornography substantially contributes to the interstate and foreign traffic in child pornography. *United States* v. *Kallestad*, 236 F.3d 225, 228 (5th Cir. 2000) (citing U.S. Dep't of Justice, *Attorney General's Commission on Pornography, Final Report* 408 (1986)). "Such pornography is exchanged through the mails, and also becomes the basis for commercial child pornography magazines, which are made not with photographs taken by the magazine producers, but rather with homemade photographs submitted by private child abusers." *Ibid.*

Second, the statute contains an express jurisdictional hook in that it requires that the visual depiction be produced using materials that have traveled in interstate commerce. See 18 U.S.C. 2251(a). This jurisdictional hook serves to limit prosecutions to "a smaller universe of provable offenses" and "reflects Congress's sensitivity to the limits upon its commerce power." *Kallestad*, 236 F.3d at 229.[6]

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[6] Petitioner argues (Pet. 22-23) that Section 2251(a)'s materials-in-commerce element is insufficient in itself to satisfy the Commerce Clause. But even if that were true, it would not be dispositive, because petitioner's "production of intrastate pornography has a substantial

Third, Congress made explicit findings about the extensive national market in child pornography and the need to reduce it by prohibiting the production of child pornography at the local level. See, *e.g.*, Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2(a), 92 Stat. 7; *Senate Report* 5 ("[C]hild pornography * * * ha[s] become [a] highly organized, multimillion dollar industr[y] that operate[s] on a nationwide scale * * * [and that is] carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce."); Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204; H.R. Rep. No. 536, 98th Cong., 1st Sess. 17 (1983) ("Generally, the domestic material is of the 'homemade' variety, while the imported material is produced by commercial dealers."); *id.* at 16 ("Those [collectors of child pornography] who do not sell their material often loan or trade collections with others who share their interest."); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Tit. I, § 121(1)(10), 110 Stat. 3009-26 ("[T]he existence of and traffic in child pornographic images * * * inflames the desires of child molesters, pedophiles, and child pornographers who prey on children,

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impact on interstate commerce," and is thus justified under the Commerce Clause on that basis. *Grimmett*, 439 F.3d at 1272 (internal quotation marks and citation omitted).

Petitioner's argument (Pet. 25) that materials such as the memory card and photo paper in this case do not qualify as "instrumentalities" of interstate commerce is likewise beside the point, because the government does not defend the statute using an "instrumentalities" theory, and the court of appeals upheld Section 2251(a)'s application in materials-in-commerce cases on the ground that local production of child pornography substantially affects interstate or foreign commerce. *Mugan*, 394 F.3d at 1024.

thereby increasing the creation and distribution of child pornography.").

Finally, Congress rationally determined that "it must reach local, intrastate conduct in order to effectively regulate [the] national, interstate market" for child pornography. *Kallestad*, 236 F.3d at 229. As the Second Circuit has explained, "Congress understood that much of the pornographic material involving minors that feeds the market is locally produced, and this local or 'homegrown' production supports demand in the national market and is essential to its existence." *Holston*, 343 F.3d at 90. It makes no difference that an individual child pornographer may not intend to sell or distribute his depictions, because "[t]he nexus to interstate commerce . . . is determined by the class of activities regulated by the statute as a whole, not by the simple act for which an individual defendant is convicted," *id.* at 90-91 (brackets in original; citation omitted).

The constitutionality of Section 2251(a) as applied to materials-in-commerce prosecutions is confirmed by this Court's recent decision in *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005). There, the Court rejected a Commerce Clause challenge to the use of the federal Controlled Substance Act (CSA), 21 U.S.C. 801 *et seq.*, to criminalize the purely intrastate manufacture and possession of marijuana for medical purposes, explaining that the activity at issue substantially affects intrastate commerce. The Court emphasized Congress's power "to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." 545 U.S. at 17. The Court also made clear that the substantiality of an individual's own activities was of no moment, so long as the aggregate activity substantially affects interstate commerce. *Ibid.*

The Court determined that Congress could rationally conclude that the growers' activities substantially affected commerce because the high demand for marijuana in the interstate market created a likelihood that marijuana grown for local consumption would be drawn into the interstate market, *id.* at 19, and because the exemption of intrastate marijuana would impair the ability of Congress to enforce its interstate prohibition given the difficulty of distinguishing between marijuana grown locally and that grown elsewhere, *id.* at 22.

The same is true here: the intrastate production of child pornography using materials that have traveled in commerce contributes to the significant national and international market for such materials. Congress rationally decided to criminalize that intrastate production in order to dry up the market. Accordingly, the application of Section 2251(a) in this case comports with the Commerce Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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